

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL ALAN MILLER,

Defendant-Appellant.

UNPUBLISHED

March 9, 2010

No. 292552

Wayne Circuit Court

LC No. 09-006790-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

MICHAEL ALAN MILLER,

Defendant-Appellee.

No. 292557

Wayne Circuit Court

LC No. 09-006790-FC

Before: Hoekstra, P.J., and Stephens and M. J. Kelly, JJ.

PER CURIAM.

In Docket No. 292552, defendant appeals by delayed leave granted a pretrial order admitting certain hearsay statements of his wife under MRE 803(3). In Docket No. 292557, the prosecution appeals by leave granted a pretrial order excluding defendant's December 10, 2008 videotaped statement. The appeal in Docket No. 292552 is moot, and we reverse the order in Docket No. 292557.

Defendant is charged with first-degree premeditated murder, MCL 750.316(1)(a), second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227b, arising from the death of his wife Jennifer Miller. Defendant admits that he shot his wife but claims that it was an accident.

I. Docket No. 292552

The prosecutor moved to admit, under the state of mind hearsay exception, MRE 803(3), statements that defendant's wife made to coworkers and friends. The trial court excluded most

of the hearsay statements, but ruled that a few of the statements were admissible. On appeal, defendant argues that the statements admitted by the trial court fall outside the scope of MRE 803(3) because the statements were of memory or belief.

At oral argument, the prosecution stated that, based on decisions issued by this Court subsequent to the trial court's order, it no longer believed that the hearsay statements of defendant's wife were admissible and that it did not intend to introduce any of the statements at trial. Because the prosecution no longer intends to introduce any of defendant's wife's hearsay statements, the issue whether the trial court erred in admitting some of the statements is moot. See *People v Billings*, 283 Mich App 538, 548; 770 NW2d 893 (2009). Accordingly, we do not address the issue.

II. Docket No. 292557

Defendant moved to exclude his December 10, 2008 videotaped statement, a statement that he voluntarily gave after appearing at the police station. The trial court excluded the statement because the two police officers and defendant referenced the hearsay statements of defendant's wife that it had previously ruled inadmissible. It concluded that, because the videotaped statement contained "continual references" to the hearsay statements, it would be impossible to present a redacted version of the statement to a jury. In addition, the trial court determined that, even if "extricated," the videotaped statement was unduly prejudicial because defendant continually and repeatedly denied that he intentionally shot his wife. We review a trial court's evidentiary decisions for an abuse of discretion. *People v Pattison*, 276 Mich App 613, 615; 741 NW2d 558 (2007). A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *People v Blackston*, 481 Mich 451, 460; 751 NW2d 408 (2008).

Defendant's statement is not hearsay, MRE 801(d)(2); *People v Lundy*, 467 Mich 254, 257; 650 NW2d 332 (2002), and there is no claim that it was obtained in violation of defendant's constitutional rights. In addition, there is no basis to exclude the statement under MRE 403. Although defendant's statement may be consistent with his defense, the probative value of the statement is not substantially outweighed by the danger of unfair prejudice. We perceive no danger that a jury would give undue or preemptive weight to the statement. *People v Gipson*, ___ Mich App ___, ___ NW2d ___ (2010).

We agree with the trial court that the prosecution may not use the "backdoor" to admit the hearsay statements of defendant's wife that it has agreed not to admit at trial. In their questioning of defendant, the two police officers, on limited occasions, directly referenced the out-of-court statements of defendant's wife. For example, the officers questioned defendant about his wife telling coworkers that she could not go out with them because she would receive hell from him and whether his wife had any reason to tell someone that it would not be an accident if something happened to her. The proper remedy is to redact the questions and defendant's corresponding answers. See *People v Smith*, 120 Mich App 429, 435-436; 327 NW2d 499 (1982).

We disagree with the trial court that the "continual references" to the hearsay statements of defendant's wife preclude presenting a redacted version of defendant's statement to a jury. Our review of the record reveals that defendant's statement is not littered with references to the

hearsay statements. For example, when defendant explains his familiarity with guns and his gun safety rules and tells the officers how he shot his wife, there are no references to the hearsay statements. In addition, when the officers asked defendant if he had a problem with his wife speaking to “Jeff” on the telephone, if he ever suspected or accused his wife of having an affair, and if he ever told anyone that he was getting a divorce, the officers did not reference the hearsay statements. Similarly, when the officers told defendant that everyone was saying that he called his wife at work over and over, the officers made no reference to the hearsay statements. Where there is no reference to the hearsay statements in the officers’ questions, the questions and defendant’s answers do not need to be redacted.

Because the trial court excluded defendant’s entire statement, we reverse the trial court’s order. On remand, if the parties are unable to agree on a redacted statement, the trial court, after conducting a thorough review of defendant’s statement, must decide which portions of the statement need to be redacted.

Reversed in part. The case is remanded for further proceedings. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ Cynthia Diane Stephens
/s/ Michael J. Kelly